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IDAHO PUBLIC  
UTILITIES COMMISSION

Attorneys for the Industrial Customer of Idaho Power

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

BOB LEWANDOWSKI AND MARK	)	CASE NO. IPC-E-04-10
SCHROEDER	)	CASE NO. IPC-E-04-08
Complainants	)	PETITION BY MARK
vs	)	SCHROEDER AND ROBERT
IDAHO POWER COMPANY, an Idaho	)	LEWANDOWSKI FOR
Corporation	)	RECONSIDERATION
Respondent	)	
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**COMES NOW**, Bob Lewandowski and Mark Schroeder ("Petitioners"), through their attorneys, Richardson and O'Leary, and, pursuant to Rule 331 of the Rules of Practice of the Idaho Public Utilities Commission ("Commission"), and pursuant to Idaho Code Section 61-626 hereby respectfully petitions for reconsideration of Order No. 29632 issued on November 22, 2004 in the above captioned matters.

This petition for reconsideration solely addresses the performance band and its associated penalties for a QF's failure to stay within that band.

**LEGAL STANDARD**

Rule 331.01 provides that any person may petition for reconsideration on the grounds that the Commission's order is "unreasonable, unlawful, erroneous or not in conformity with the

law". Your petitioners respectfully submit that the Commission's order is both unreasonable and not in conformity with the law in that it is based on an incomplete record. In support of their Petition for Reconsideration your Petitioners say as follows:

#### INCOMPLETE RECORD

The issue before the Commission was whether Idaho Power's insistence on the concept of "shortfall" energy in the power purchase agreements (PPA) it offers to qualifying facilities was unreasonable. The concept of shortfall energy is that whenever a QF's production falls below 90% of the amount called for in the PPA then that QF would pay Idaho Power for the lost production. The shortfall energy price the QF owes to Idaho Power would then be either the contract rate or the Mid-C price whichever is higher<sup>1</sup>. This issue was litigated as to whether such a price is acceptable. The impact of the shortfall energy penalty on the QF industry was well documented by several witnesses.

In its decision, the Commission correctly observed that "such a shortfall energy pricing method might have the potential of exacting too heavy a price." Order No. 29632 at page 20. But then the Commission provides that, "We instead find it reasonable that when the QF fails to deliver 90% of the monthly commitment amount to **price all energy delivered** at 85% of the market price, or the contract price, whichever is less." *Id.*, emphasis provided. This is a 'solution' that no party to the proceeding proposed or even addressed. Therefore no party to the proceeding had an opportunity to address the consequences of a pricing methodology which severely penalizes a QF – even if it is only one tenth of one percent below the 90 percent target. Because the Commission's decision is not based on the record it is not in conformity with the law.

The Idaho Supreme Court has clearly ruled that if the Commission's findings are not based on the record, then those findings are not in conformity with the law. In *Application of Hayden Pines Water Co*, the Court declared: "If the findings of the Commission are not supported by substantial and competent evidence, or the Commission clearly abused its discretion, then this Court must afford relief..." at 111 Idaho 331, 335 (1986). The Commission is very familiar with the substantial and competent evidence test. The record in this proceeding contains no references to the solution adopted by the Commission and hence fails to meet this basic threshold. Reconsideration is necessary in order for the Commission to fully understand the consequences of its decision and to allow the parties an opportunity to present their positions as to the impact of this decision on the industry.

#### THE COMMISSION'S RULING IS UNREASONABLE

Renewable resources, such as hydro, solar and wind, are weather dependent for the source of their "fuel". The only production-related aspect of a renewable QF that it has control over is whether or not its plant is available to produce power when the resource is available. As Commissioner Smith correctly pointed out in her dissent, imposition of a production band is nothing more than a penalty. In fact, the shortfall energy concept would actually be more desirable than penalizing the QF by pricing ALL OF ITS PRODUCTION at the Mid-C rate for falling below the 90% target. Were a QF to produce 89.9% of its target then all of its production is priced at 85% of Mid-C. Further exacerbating the price uncertainties introduced by such a penalty is the fact that there is no floor below which the rate could go.

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<sup>1</sup> Idaho Power offered to cap the shortfall energy price at 150% of the contract rate.

Renewable QFs will now be forced to attempt to mitigate the risk that all of its production will be at risk of price uncertainty. In order to accomplish that goal, QFs will have to contract for energy production levels considerably below what it would normally expect to produce in order to avoid having all of its energy production at risk of price uncertainty. This results in a defacto rate decrease in avoided cost rates for just renewable projects. The negative impact of the penalty is compounded by the fact that there is no ability for the QF to make up the downside because whenever its production exceeds 110% of the contract amount the price penalty also applies.

The impact of the Commission's decision is less onerous on thermal projects because they have control over their fuel supply. Renewable projects do not have that control and are hence treated differently by the Commission's order. Requiring renewable projects to predict the weather while not also requiring thermal project to predict the weather is discriminatory. The analogy is not as absurd as it appears. If the Commission and Idaho Power are truly concerned about the predictive ability and reliability of Idaho Power's QF projects, then the penalty for failure in those areas should only be imposed on QFs for events over which they have some control. The weather is not such an event.

The penalty for failure to meet the 90% threshold is also illogical and counter intuitive. When Mid-C prices are below the contract price, Idaho Power is likely in a market in which there is surplus energy and falling prices. At those times it is actually beneficial to Idaho Power to have fewer resources to dispose of. However, the penalty works to incent the QF to be most reliable in energy deliveries at just the time Idaho Power would prefer the QF to be less reliable. At times when the Mid-C price is higher than market Idaho Power is likely to be either in deficit

or would like to have additional resources to sell in a bullish market. However because of the one-sided nature of the penalty there is no incentive for the QF to increase production above the 110% level because it is capped at market price or contract price whichever is less.

The Commission's ruling is inherently unreasonable as it is completely unrelated to the problem Idaho Power initially attempted to solve when it came up with the shortfall energy concept in the first place. Were this Commission to adopt a band for plant availability factor, the QF industry would be better equipped to comply. As it is, the Commission has placed the industry in a position of being penalized for events completely out of its control. The practical effect of which will be to severely restrict development of renewable resources in Idaho.

#### PROPOSED SOLUTIONS

The best solution to both Idaho Power's and the Commission's concern is to impose the penalty on QFs whose availability factor falls below a certain level – say 90%. Availability factors are in the control of the owner of the generating station. They are a common utility standard for measuring reliability that all parties will be able to easily ascertain. Requiring a QF to maintain a certain level of availability will insure that they are as reliable as they possibly can be. Regardless, however, no penalty should be based on market prices. Any penalty should be based on a fixed scale of gradually decreasing rates that corresponds to the QFs decreasing plant availability factor. With a such a graduating scale based on contract rates, the QF will be able to understand, in advance, the consequences of failure to maintain its plant availability factor.

A second possible solution would be for the Commission to require that weather may be claimed as an event of force majeure. If a QF could claim weather as an event of force majeure

then the penalty would not be imposed when the renewable resource was not available due to drought and the like.


PRAYER FOR RELIEF

WHEREFORE Mr. Lewandowski and Mr. Schroeder respectfully pray for this Commission's order granting reconsideration in Dockets Nos. IPC-E-04-08 and IPC-E-04-10.

Your petitioners stand ready to proceed to hearings in this matter on reconsideration.

Respectfully submitted this 13<sup>th</sup> day of December, 2004.

RICHARDSON & O'LEARY PLLC

By:   
Peter J. Richardson, ISB #3195  
RICHARDSON AND O'LEARY  
Attorneys for Mark Schroeder and  
Robert Lewandowski

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2004, I caused a true and correct copy of the foregoing **PETITION BY MARK SCHROEDER AND BOB LEWANDOWSKI FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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